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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 524

NORRIS & HIRSHBERG, INC.,
Petitioner,

vs.

SECURITIES AND EXCHANGE COMMISSION

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

JOSEPH B. BRENNAN,
WILLIAM A. SUTHERLAND,
CARL MCFARLAND,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

Your petitioner, Norris & Hirshberg, Inc., prays that a writ of certiorari be issued to review a final order of the United States Court of Appeals for the District of Columbia taking jurisdiction of a review proceeding respecting an order of the Securities and Exchange Commission.

Opinions Below

The opinion of the Securities and Exchange Commission respecting the record issues here involved (R. 163-174) is not yet officially reported (Release No. 3926, March 11, 1947). Its earlier opinion on the merits (R. 44-110), here not directly involved, is similarly unreported (Release No. 3776,

January 24, 1946, as amended April 17, 1946). The opinion of the court below dated February 17, 1947 (R. 146-152) was amended June 5, 1947, and is set forth at (R. 153-160) and is also reported at 163 F. 2d 689.

Jurisdiction

The first order of the court below remanding the cause to the Securities and Exchange Commission for defects of record was entered February 17, 1947 (R. 161). On July 16, 1947, the Commission's motion for stay of execution was denied and the record filed by it with the court was ordered returned to the Commission (R. 193). On September 25, 1947, the Commission refiled the record with corrections (R. 194). Thereupon petitioner's motion for judgment and remand upon the refiled record was denied by order of November 19, 1947 (R. 198). Petitioner's request for rehearing was denied by order of January 5, 1948, and the court below stayed proceedings there on the merits provided this petition be filed by January 12, 1948 (R. 199-200). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. 347(a)).

Questions Presented

Whether, pursuant to a statute requiring as a prerequisite to jurisdiction of the reviewing court that first "*the Commission* shall certify * * * the record *upon which* the order complained of *was entered*," a statutory reviewing court obtains jurisdiction where—

1) after challenge of a filed record admittedly incorrect because of material inclusions and exclusions, the reviewing court permitted the agency to make mere corrections without even an explanation as to whether the correct record

was actually the one utilized for administrative consideration and decision;

2) after challenge of the identity of the filed record on the ground that a prejudicial summary had been utilized by the Commission as the basis for decision in lieu of the hearing record, the agency pleaded that it would "neither affirm nor deny" the fact and the court took no action thereon; and

3) despite the circumstances and the Commission's admission that its certification necessarily rested on a presumption that the commissioners who decided the case performed their duty, the court accepted the Commission's certificate of record as conclusive as to the genuineness of the filed record.

Statute Involved

Section 25 of the Securities Exchange Act of 1934 provides in relevant part as follows (15 U. S. C. 78y):

> Any person aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person is a party may obtain a review of such order * * * in the United States Court of Appeals for the District of Columbia, by filing in such court * * * a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, and enforce or set aside such order, in whole or in part. * * *

The proper interpretation and due enforcement of the last two sentences of the above quotation are in issue here.

Statement

Pursuant to the statute petitioner filed in the court below its petition for review of respondent's order depriving petitioner of its right to continue in the business of a broker-dealer (R. 113-124).[1] Pursuant to the same statute respondent, after service, was required to "certify and file in the court a transcript of the record upon which the order complained of was entered" (15 U. S. C. 78y). A purported record was thereupon filed by respondent (R. 206-207). Petitioner then filed with the court below its petition for common-law writ of certiorari alleging defects of record and calling for the production of the record required by the statute (R. 128-133).[2] After the pleadings were closed (R. 135-139) the court heard oral argument, wrote an opinion (R. 146-152), and remanded the case and the filed record to the Commission (R. 161, 193).

Thereupon the Commission refiled the record with corrections (R. 194). Petitioner moved for the entry of a further judgment of reversal and remand or other appropriate relief (R. 197) which the court denied, simultaneously ordering petitioner to proceed upon the merits on the refiled record (R. 198). By the latter order the court below finally settled and adjudicated, for the purpose of all further proceedings before it, the issue respecting its jurisdiction notwithstanding defects of record. *Hamilton Shoe Co.* v. *Wolf Brothers,* 240 U. S. 251, 258-259; *McClel-*

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[1] The order complained of was based on findings of fact contrary to the findings of the trial examiner before whom sixty-seven witnesses testified in person. The examiner found that in point of facts none of the charges had been proved.

[2] Pursuant to the "all writs" section of the code empowering the Court "to issue all necessary and proper remedial prerogative writs in aid of its appellate jurisdiction." D. C. Code 1940, 11-208; *Sullivan* v. *District of Columbia,* 19 U. S. App. D. C. 210, 216. See also *United States* v. *Adams,* 9 Wall 661, 663; *In re Chetwood,* 165 U. S. 443, 462.

land v. *Carland*, 217 U. S. 268. Request for rehearing was denied (R. 199-200).

In the course of these proceedings it was pointed out by the court below: (1) That the petitioner charged, and the Commission admitted, that thirteen exhibits of importance to its defense were represented in the record originally filed as having been received "for identification only" (R. 156). (2) That the Commission similarly admitted (R. 156):

> that the transcript contains as Commission exhibits twelve documents which not only were not received in evidence, but were not offered as such, having been made up and attached after the record before the trial examiner had been closed.

(3) With respect to the substituted and prejudicial summary allegedly utilized in lieu of the record for purposes of the Commission's decision, the court below ruled that the merit of the challenge, the facts with respect to which the Commission refused to affirm or deny (R. 138) and hence stood admitted (R. 155), "depends upon the nature of the summary and the use to which it was put by the Commission" (R. 158). (4) It also ruled that a certification of record by the Commission's chief file clerk did not satisfy the statutory requirement (15 U. S. C. 78y) that "the *Commission*" shall certify as to the record "upon which" the order complained of "was entered" (R. 157-158).

The court below properly ruled that, under the statute, it was (R. 159):

> vitally concerned with knowing that the record considered by the Commission was in fact a true record; which means that it is of first importance for the court to know whether, in reaching its decision, the Commission considered as evidence all the matter which was introduced as such, and nothing more. That was its duty. If the duty was not performed, the order was void *ab initio*, and there is no occasion for judicial re-

view to determine whether an inaccurate record shows substantial evidence to support it.

The court rejected several attempts of the Commission to merely patch up and correct the record as filed (R. 135-145, 161-162, 175-193) and, as stated above, remanded the case and returned the filed record to the Commission (R. 161, 193). But when thereafter the Commission merely returned the corrected record (reduced to 3575 pages) to the court with a new certificate in the same statutory language (R. 194), the court below apparently regarded itself as estopped from proceeding further respecting the record (R. 199-200).

The court accepted the Commission's certificate as conclusive of facts essential to the court's jurisdiction, in the face of the Commission's prior admission that the certificate was necessarily based on a presumption.[3] Accordingly, the ultimate issue in this case is whether an agency's certificate precludes a reviewing court from finding or inquiring into the actual facts as to the identity of the transcript upon which it is required to review the agency's order under circumstances where the certificate is admittedly based on a presumption contrary to evidence before the court.

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[3] The Commission gave the court the following explanation of its understanding of the meaning of its certificate in this case where there had been a change of membership of the Commissison between its decision and certification: "The entry of the order complained of and the adoption by the Commission of its findings and opinion were its solemn official acts, and as such implied that the commissioners participating conscientiously discharged their official function in the case • • • We believe it follows that the act of certification by the Commission can purport to be no more than an assurance by the Commissioners now certifying that they conscientiously regard the record they certify as a 'transcript of the record upon which the order complained of was entered'" (R. 189-190).

Specifications of Errors to Be Urged

The court below erred:

(1) In entering its orders of November 19, 1947, and January 5, 1948, whereby it took jurisdiction to review the merits;

(2) In permitting the Commission to merely correct the filed record without showing that it was the record actually relied upon by the Commission for its consideration and decision of the case;

(3) In declining to enter a judgment of reversal and remand after the Commision had chosen to "neither affirm nor deny" that it had actually utilized for purposes of its consideration and decision a substituted and prejudicial "summary" instead of the hearing record filed with the court;

(4) In refusing to find or determine the facts after due challenge by the petitioner of the correctness and identity of the record used by the agency for purposes of decision of the order submitted for review;

(5) In declining to pass upon the lawfulness of the Commission's action in delegating to subordinates its statutory function of certifying records for purposes of judicial review; and

(6) In regarding the certification of record last filed as conclusive despite the admitted irregularities and other circumstances of the case.

Reasons for Granting the Writ

IN TAKING JURISDICTION TO DETERMINE THE MERITS IN THIS CAUSE THE COURT BELOW HAS DECIDED QUESTIONS OF IMPORTANCE IN CONFLICT WITH THE USUAL COURSE OF JUDICIAL DECISION AND HAS POSED STATUTORY ISSUES WHICH SHOULD BE PROMPTLY SETTLED BY THIS COURT.

The issue in this case is important both in the field of legislation and administrative law. Whether statutory requirements may be met by mere recitals is a question of consequence to Congress. More fundamentally, does the fair administration of justice permit a curtain to be drawn across the administrative utilization of records in cases required by statute to be considered and determined upon the transcript of a hearing?

To prevent inquiry in the circumstances of this case would make the elaborate paraphernalia of "fair hearing" largely illusory. It would make moot the refusal to disclose proofs and reliance upon secret records heretofore roundly condemned. *Ohio Bell Telephone Co.* v. *Commission*, 301 U. S. 292, 300, 304. The issue is more fundamental than the mere preliminary right to introduce relevant evidence, the purpose of which is to assure that an administrative agency will act only "after consideration of all relevant information." *American Trucking Assns.* v. *United States*, 326 U. S. 77, 86. Here the petitioner has in part been denied an opportunity even to see the alleged evidence used against it prior to decision, which is much more than the lack of opportunity "to supplement and explain" which has been held a violation of the rudiments of fairness. *West Ohio Co.* v. *Commission*, 294 U. S. 63, 70-71. Certainly it is more of a departure from lawful process for the Commission to base its decision on a substituted and [illegible]cial summary of record than to proceed by "guesswo[illegible]retofore held to

be a violation of due process because arbitrary. *West Ohio Co.* v. *Commission*, 294 U. S. 79, 81-83.

In view of the importance of the issue and the consequences of further and costly proceedings upon a fatally defective record, this Court should grant the writ even though the action sought to be reviewed may be in a sense interlocutory. Under similar statutory provisions for judicial review this Court held the matter of filing the record to be truly jurisdictional. *In re Labor Board*, 304 U. S. 486, 493-494; *Ford Motor Co.* v. *Labor Board*, 305 U. S. 364, 371. The court below has stayed proceedings upon the merits to permit the filing of this petition (R. 199, 200). The cause is properly one for review by this Court at this stage because of "the hardship imposed on petitioners by a long postponed appellate review, coupled with the attendant infringement of the asserted Congressional policy". *U. S. Alkali Assn.* v. *United States*, 325 U. S. 196, 205.

By its action in this case the court below has decided a question of importance in conflict with the applicable decisions of this Court and contrary to the accepted and usual course of judicial decision. It has determined a statutory question which should be determined and settled by this Court as speedily as possible because of its importance in the field of administrative law. The necessity therefor is enhanced by the form of the action below. On the one hand the court below has set forth general requirements of law (R. 153-160, 163 F. 2d 689) but thereafter, without opinion or distinguishing circumstances, it has reversed itself (R. 198) apparently upon the theory that administrative recitals are conclusive (R. 199-200). Such a situation is bound to promote misunderstanding and foster litigation in connection with a fundamental and specific question which has not been but should be settled by this Court.

1. *The court below is without jurisdiction because it has merely permitted the agency to correct an admittedly faulty*

record without showing whether as corrected it was the record actually utilized for purposes of administrative consideration and decision.—Having corrected its listing of the record documents to show that petitioner's exhibits were actually introduced in evidence (R. 194-195) is not enough. There is no statement, finding, or evidence to indicate that this portion of petitioner's evidence was not actually dropped out of the case between the close of the taking of evidence and the filing of the record in the court below. That it was so dropped appears because the respondent Commission has persistently declined to state the facts and because its opinion of March 12, 1947, evasively states that "the index • • • was not part of the record before the Commission" and "had nothing whatsoever to do with our decisional process" (R. 164-165). The court below held, on these facts, that it was not advised "as to what sort of record the Commission did consider" (R. 160).

The disclaimer of the Commission in the cryptic terms of its "decisional process" is meaningless. The issue is not whether the paper labeled "index" was technically "part of the record" or was made up after the "decisional process," but whether it reflects an error as to the contents of the record as of the time it was considered by the Commission in making its decision and issuing its order. Petitioner had a statutory right to submit relevant evidence which the agency could not deny. *American Trucking Assns.* v. *United States,* 326 U. S. 77, 85-86; *Edison Co.* v. *Labor Board,* 305 U. S. 197, 225-226. After submittal of evidence at the administrative level it has *a fortiori* a right to have such submittals treated as evidence for purposes of administrative determination of the issues. Even if the evidence so submitted is not conclusive, "it may be decisive in the Commission's determination". *American Trucking Assns.* v. *United States, supra.* Here positive evidence has been furnished by the hand of a member of the Commis-

sion's staff (presumably informed on the subject because he executed the original filing of the record, made the certificate thereof, and was in general charge of such matters) to the effect that petitioner's thirteen exhibits were *not* then considered as admitted in evidence. Such being the case, both law and candor require at the very least that the Commission state unequivocally whether or not its official record keeper was mistaken. Its refusal to do even that much requires the conclusion that the Commission cannot in good conscience answer the question except in a manner prejudicial to the validity of its order in the case.

The same is true of the admittedly spurious Commission exhibits (R. 221-254, but see particularly the note at the foot of page 221). The Commission admits that its prosecuting staff "had prepared and inserted in the file the material in question" (R. 166). They were discovered at the time of the oral argument before the Commission and petitioner moved that they be deleted but, though admitting that they were improper and contained evidentiary matter not in evidence, the prosecutors objected to their removal (R. 257-259). Although the Presiding Commissioner then ruled that "those things will be removed" (R. 259), nearly two years later they turned up in the court below certified as evidence of record. The failure to remove these spurious exhibits from the record is all the more misleading in these circumstances, because the case was under consideration for seventeen months and the commissioners who consulted the record would obviously assume that it had been purged as directed.[4] Thus manifestly there

[4] The Commission's opinion of March 12 would now have it appear that the ruling of the Presiding Commissioner was somehow and secretly rescinded or overruled. "The Commission," says the administrative opinion (R. 166), "notwithstanding the ruling of the presiding commissioner that the material would be 'removed' has not directed the physical removal thereof but has determined that the material should remain in its own file where it was placed." The opinion then refers to "this decision not to

is violated the rule that "nothing can be treated as evidence which is not introduced as such." *United States* v. *Abilene & Southern Ry. Co.*, 265 U. S. 274, 288. With this requirement this Court has held that "there can be no compromise on the footing of convenience or expediency." *Ohio Bell Tel. Co.* v. *Commission*, 301 U. S. 292, 300-305.

The Commission plainly states that it does not construe the requirements of law as did the court below (R. 169):

> We construe the opinion as merely indicating that the prior certification leaves uncertain the record status of the exhibits in question. We further understand that this may be corrected by a certificate specifying that the material complained of is not regarded by the Commission as part of the evidence in the case * * *.

But there never was any uncertainty or dispute in the court below as to the "record status" of the exhibits. The question is whether they *were* regarded as part of the record *at the time of administrative consideration and decision*, not whether they are now so regarded. Respondent's present understanding is obviously immaterial. Its last filed certificate of record therefore admittedly does not meet the requirements of either general law or the statute specially applicable here.

2. *The court below is without jurisdiction because, upon a challenge that the Commission actually utilized a substituted and prejudicial "summary" instead of the hearing record filed with the court, the latter took no action despite*

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cause the physical removal of the matters from the files" and to "our decision to keep the material in our files" (R. 166, 168). If there was such a subsequent "decision," the transcript previously certified *and presently certified* is defective in failing to include it along with other minutes and rulings which are included. Moreover, if there was such a decision, respondent had not previously made it known to petitioner and such lack of notice in such a matter would of course be inconsistent with a fair hearing and repugnant to due process of law. *West Ohio Gas Co.* v. *Commission* (No. 1), 294 U. S. 63, 68, 70.

the pleading of the agency that it would "neither affirm nor deny" the fact.—The statute specially applicable here requires of the respondent Commission both that it keep "appropriate records" of its hearings (15 U. S. C. 78v) and produce and file in the reviewing court "the record upon which the order complained of was entered" (15 U. S. C. 78y). The practice of the Commission to utilize summaries of record is set forth in the relevant monograph of the Attorney General's Committee on Administrative Procedure. Senate Doc. 10, 77th Congress, pt. 13, pp. 92-95. In this case the examiner, who found the facts for petitioner but was reversed by the Commission, pointed out the misleading nature of the staff's summary of testimony in connection with requested findings of fact, saying (R. 14, n. 1):

> Commission counsel's requests 3-108 purport to be condensations of the testimony of each of the customer witnesses. However, they deal only with the direct examination [here conducted by the Commission's prosecutors], omit the developments of the cross examination, and ignore what was developed in respect of these witnesses by the testimony offered by the registrant.

In the court below petitioner pleaded that the Commission decided the case on a prejudicial summary instead of the hearing record (R. 132). The Commission refused to plead to the issue (R. 138). The court below then held that the issue "depends upon the nature of the summary and the use to which it was put by the Commission" (R. 158). But the Commission has significantly failed to deal with the subject in its otherwise exhaustive opinion of March 12, 1947 (R. 163-174). By its latest certification of record filed below it exalts form over substance by simply relying upon the statutory language for its certification (R. 194) and the court below apparently deemed itself estopped thereby (R. 199-200). Hence the requirement of the statute that the

actual record utilized for purposes of decision be filed with the reviewing court (15 U. S. C. 78y) has been set at naught.

3. *The court below erred in an important matter of federal statutory law because, despite the circumstances and particularly in view of the Commission's stated assumption of limited responsibility therefor, the court regarded the agency's certificate of record as importing absolute verity and hence conclusive.*—The statute requires that "the Commission" shall certify to the record filed in the reviewing court (15 U. S. C. 78y). No authority to delegate any such function appears. Consequently no subordinate has authority to speak for the Commission. *Thompson* v. *Texas Mexican Ry. Co.*, 328 U. S. 134, 146. The court below first so held (R. 151, 158). The Commission's opinion thereafter rendered states that the "certifications of Commission records for purposes of court review will be executed in the name of the Commission, by its Secretary" (R. 170, n. 8). Its theory is that "the necessity of delegation in connection with the certification process flows from the mechanical nature of the problem" and that its only function is to "rule upon any difference of opinion between the parties to the case and the subordinates to whom the mechanical process is so delegated" (R. 171, 173).[5] Therein the Commission

[5] Thereby the direction of Congress as set forth in the statute was and is set aside by administrative action Apart from the fact that the certification function is one which only the heads of the agency could fully perform, the duty is an important one which Congress has seen fit to lodge in the Commission alone. Due performance of such a statutory duty requires something more than reliance upon presumption, "mechanical process," or *pro forma* certification by a subordinate albeit "in the name" of the Commission. It is true that the personnel of the Commission may change, as it has in this case. That cannot override statutes and statutory rights. Administrative record systems ordinarily indicate who has used given documents and for what purpose. But here the official record was obviously and admittedly defective as shown by the filing of such a record originally in the court below by the Commission's official record keeper. The latter's understanding presumably reflects the true situation in the absence of the commissioners who actually decided the case.

overlooks that its more important statutory function is to represent personally to the reviewing court that the record certified was the sole basis for its decision.

The certificate is substantially the same in language as the previous certificates filed or tendered. It merely asserts, in the language of the statute, that the documents to which it is attached are those "upon which the order of the Commission complained of was entered" (R. 194). But the Commission has made it clear that it was not thereby representing any *fact* as to the identity of the record on which its decision was made. It rests this certificate on a mere presumption that its predecessors did their duty. It stated to the court below that, in the circumstances here, its certificate "can purport to be no more than an assurance by the commissioners now certifying that they conscientiously regard the record they certify" as "a transcript of the record upon which the order complained of was entered" (R. 190). In view of the circumstances and the Commission's interpretations, this assurance is without foundation.[6] Moreover, "recitals of * * * procedure cannot be regarded as conclusive" in a challenge of administrative action because "otherwise the statutory conditions could be set at naught by mere assertion." *Morgan* v. *United States*, 298 U. S. 468, 477. Consequently the order of the court below (R. 198), which apparently now regards the certificate as importing absolute verity (R. 199-200) despite

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[6] In the Commission's "opinion on remand" of March 11, 1947, which was filed with the court below, it was said (R. 174): "The Commission has no difficulty in certifying that the transcript of record heretofore certified in the case (excluding of course the post-decisional index) is an authentic transcript of the record upon which the orders complained of were entered." But that transcript admittedly contained the spurious exhibits (R. 137-138, 155-156, 257-259). The contrary cannot therefore now be assumed on the basis of a similar certificate attached to a later transcript which excludes such material.

the circumstances of the case and the evasions of the Commission,[7] makes a mockery of the statutory condition (15 U. S. C. 78y). Indeed, so interpreted, the legislative provision for a certificate defeats its own purpose by foreclosing inquiry.

Conclusion

Notwithstanding the several separate aspects of the action of the court below, the fundamental issue here is the integrity of the administrative process. Public and legislative confidence therein will not be promoted by permitting the basic question here involved to remain unsettled. At almost every sitting this Court hears arguments of less important administrative law issues. The statutory right to a real hearing, and the body of law which this Court has built to assure a fair hearing, both require that the nature and identity of the records used by administrative agencies for purposes of their consideration and determination of cases be determined. General admonitory or permissive language of this Court has not yet been applied to this spe-

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[7] Petitioner requested the court below to determine the facts (R. 133). After its order accepting the refiled and recertified record (R. 198), petitioner requested that it make findings and conclusions (R. 198-199). This, too, was denied (R. 199-200). The court did not even require the Commission to make an unequivocal statement as to the record utilized for purposes of decision. It did not remand the case for the purpose of making findings as to the record utilized nor, after the unspecified remand (R. 193), did the Commission undertake to make such findings. See *Ford Motor Co.* v. *Labor Board*, 305 U. S. 364, 374-376. Findings by the court are particularly necessary where, as here, the cause must ultimately come directly to this Court for review. *Interstate Circuit* v. *United States*, 304 U. S. 55, 56-57. They are important in any case in order that petitioner may have an adequate opportunity for review by this Court. *Cleveland, etc. Ry.* v. *United States*, 275 U. S. 404, 414; *Public Service Commn.* v. *Wisconsin Tel. Co.*, 289 U. S. 67, 70-71; *Mayo* v. *Canning Co.*, 309 U. S. 310, 316; *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 675; *Hammond* v. *Schappi Bus Line*, 275 U. S. 164, 169, 171-172.

cific issue. It will promote the administration of justice if the problem posed by this case is authoritatively determined by this Court.

Respectfully submitted,

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(4935)

Supreme Court of the United States

October Term, 1947

No. 524

NORRIS & HIRSHBERG, INC.,
Petitioner,

vs.

SECURITIES AND EXCHANGE COMMISSION.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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REPLY BRIEF FOR PETITIONER

This reply is submitted by petitioner to demonstrate the failure of respondent's brief to meet the facts and issues in the case.

1.

In opposing certiorari, respondent suggests that petitioner's attack on the records filed with the court below has been captious and dilatory (Br. 2, 12, 16, 20-21). But petitioner has simply acted as required to protect its substantial rights. The administrative proceedings were extensive and long delayed by the Commission itself. The Commission's order revoking petitioner's license was based upon findings of fact contrary to the findings of the Trial Examiner before whom the witnesses testified in person.

The scope of review in the Court of Appeals is limited, thereby making it of prime importance that it have before it the actual record which was used by the respondent Commission in reaching its decision. It is of great importance to petitioner that it should not be required to proceed to a review of the merits upon a fatally defective record. Indeed the present issue is whether under the circumstances of this case the Court of Appeals has jurisdiction to proceed.

The court below certainly did not think that petitioner's insistence upon a proper record was captious. It considered the questions raised about the record substantial enough to justify the following actions:

(a) On February 17, 1947, the court below remanded the case to the Commission (R. 161) to proceed in conformity with its opinion of that date (R. 146-152). In that opinion the court referred to petitioner's allegation, which the Commission admitted, that the transcript contained as Commission Exhibits twelve documents which had not been received in evidence but which were attached after the record before the Trial Examiner had been closed. The court then said: "This criticism is a serious one" (R. 149, 156).

(b) The court below refused to accept a new certification tendered by the Commission on March 11, 1947, although in the language of the statute (R. 185-187).

(c) In response to petitioner's criticism of that part of the court's opinion of February 17th relating to the summary or digest of evidence used by the Commission (R. 151-152), the court on June 5, 1947 amended its opinion in so far as it dealt with that subject (R. 158-160).

(d) On July 16, 1947, the court denied the Commission's motion for stay of execution and for leave to file an amended certification of transcript, dated June 20th (R. 193), although such certification was in the language of the statute and admittedly identified the correct record status of all material in the filed transcript (R. 185-187).

The action taken by the court below on November 19, 1947, accepting the re-filed transcript with the certification of September 23, 1947 (R. 194-197, 198) involved a change of position by that court. The importance of the issue remains in the case. It can be set at rest only by affirmative action of this Court.

2.

Respondent's brief in opposition many times misstates the central issue of law in this case.[1] The question is not whether the *present* certified transcript "fully reflects the evidence offered and received in the administrative proceeding" (Resp. Br., pp. 12-13). The question is whether, under the circumstances of record here, the respondent Commission even had the proper record before it *when it decided the case.* There is no question of identifying that evidence which was properly offered and received in the administrative proceedings, as respondent would suggest (Id. at p. 2). Instead, the issue here is whether, in deciding the case, the Commission utilized a record which contained only that evidence and all of that evidence.

It is apparent from the admitted facts that the record before the Commission at the time of decision was misleading and defective. For one thing, it contained spurious exhibits which had the appearance of evidence (R. 221-254). Other defects are described in the petition. Where the record before the Commission at the time of decision was thus defective and misleading there is no basis for *assuming* that the record did not mislead the Commission.

[1] The question is not, as respondent would prefer to have it, the propriety of "interrogation as to the *manner* in which the members of the Commission utilized the record in arriving at their decision" (Resp. Br., p. 2), or determination of what constitutes a "proper consideration of the record" (Id. at p. 6) or an "inquisition" into that subject (Id. at p. 7), or "*how* the various items . . . were treated by the Commission in its decisional process" (Id. at p. 11), or "a time-consuming inquiry into the intellectual processes of the individual deciding Commissioners" (Id. at p. 13). *(Italics added)*

Although, in the absence of some such circumstance, a presumption might be indulged that the predecessor Commissioners "conscientiously discharged their decisional process" (Resp. Br., p. 20), such presumption can not prevail where the Commissioners had before them a record so obviously defective that it would be unlikely not to mislead. Even if it be assumed that the Commissioners' consciences were clear, the question is whether they acted upon an admittedly defective record—a question of fact. Under the circumstances of this case is petitioner entitled to have this fact determined? That is the issue here.

Respondent says (Resp. Br., p. 20) that "it is not clear that any certification by present Commissioners could satisfy petitioner." By this statement respondent attempts to pose an issue *not* presented in this case, namely whether as a general proposition successor Commissioners can ever certify as to the actual record used by their predecessors. But petitioner merely contends that *under the circumstances of this case* the present Commissioners are not in a position to furnish a certification as to the actual record used by their predecessors in reaching their decision. Here the respondent has made it clear that its certification must rest upon a bare presumption, and while generally such a presumption might be sufficient, it is rebutted here by admitted facts which constitute substantial evidence tending to prove the contrary. None of the authorities cited in respondent's brief suggests that a reviewing court must accept an agency's certification as conclusive as to the identity of the record used for decision, much less so under circumstances such as are presented here.

3.

Respondent seeks to minimize the importance of the spurious exhibits which its prosecuting staff inserted in the files of evidence after the record was closed and before submission of the case to the Trial Examiner. Although respondent admitted in its "Opinion on Remand" that

it had been "improper" to attach such material to the evidence (R. 168), it sought to argue there (R. 166-168) as it does here (Resp. Br., pp. 14-15) that the error was cured by a ruling of the Presiding Commissioner at the oral argument (R. 257-259). But, on the contrary, that ruling actually increased the confusion.

Petitioner had called attention to the presence of such extraneous material in the evidentiary files and had moved to have it taken out of the record (R. 257). The Presiding Commissioner ruled that "those things will be removed" and "they will go in their proper place as part of the argument rather than as part of the record" (R. 259). Respondent now argues that, notwithstanding this ruling, the Commission merely "followed a common practice" in allowing the material to remain, together with the Commission's ruling (Resp. Br., p. 15). This argument might be persuasive *if* the ruling had simply been that the material in question was not evidence (which was not the issue), *if* the material had been specifically identified at the time of the ruling (which it was not), and *if* the material had been clearly marked as "not evidence" (which was not done). But the ruling was that the material "will be removed". Consequently, anyone thereafter consulting the record during the seventeen months during which the case was under consideration by the Commission would naturally assume that the record had been purged of all spurious exhibits in accordance with the ruling. Anyone would then naturally assume that what remained was genuine evidence.

Moreover, the argument made by respondent in its brief (p. 15) to the effect that in allowing the extraneous material to remain in the evidentiary files the Commission merely followed a common practice is nullified by the fact that the Commissioners' ruling that "those things will be removed" and "they will go in their proper place as part of the argument rather than as part of the record" (R. 259) was partly carried out. ***Some but not all of the extra-***

neous material was removed from the evidentiary files. This fact is apparent from an examination of the respondent's brief (p. 14) in the light of the record.[2] This circumstance makes even more misleading the record before the Commission during the seventeen months that elapsed between oral argument and the decision by the Commission.

4.

Respondent misses the point as to the summary or digest of evidence prepared for the Commission's use by its Opinion Writing Office. Petitioner did not contend that the use of such a summary by the Commission was fatal to the proceeding if it were used "only as an aid in considering the actual evidence" (R. 160). Petitioner's allegation was that the summary was used by the Commission "in lieu of the reporter's transcript of testimony" and

[2] In Respondent's Requested Finding No. 162 (R. 255) the respondent stated that the "Commission's Exhibits 10 and 61-72 inclusive have attached thereto complete explanations of the contents thereof" and that "copies of the aforesaid explanations are attached hereto and marked 'Schedule B' for identification". Respondent's brief (p. 14) admits the same thing—that the material attached to the Staff's Requested Finding No. 162 as Schedule B was identical with the material which was later found to have been improperly placed in the evidentiary files. Yet, a comparison of said Schedule B with the extraneous material physically found in the evidentiary files in the record originally filed in the Court of Appeals will show that some of the material in Schedule B was not to be found with the extraneous material in the evidentiary files. For example, the explanatory material headed "Commission's Exhibit No. 64" was not included in the evidentiary files of the transcript filed with the Court of Appeals, but two sets of that material were included in said Schedule B (R. 255, 221-254). It seems clear that some of the material improperly placed in the evidentiary files was later and secretly removed (See Note under Schedule B at R. 255). This fact demonstrates the complete confusion in the minds of the Commission as to exactly what did happen, especially when compared with the Commission's assertion in its "Opinion on Remand" that it had subsequently (and secretly) overruled the Presiding Commissioner and decided "not to cause the physical removal" of the questioned material (R. 166).

that "this summary or digest, rather than the transcript of testimony, constitutes the 'evidence' upon which the Commission overruled its Examiner and issued its order" (R. 132). Respondent refused to affirm or deny these allegations of fact (R. 138).

The court below said that the validity of petitioner's objection "depends upon the nature of the summary and the use to which it was put by the Commission" (R. 158). Respondent gave no assurance to the court below, and gives no assurance to this Court, that the summary was not used by the Commission *in lieu of* the reporter's transcript. Respondent's brief fails to meet the issue with respect to the summary (Resp. Br., pp. 17-19). This Court is therefore presented with the question whether an agency may rely on a summary of evidence prepared by subordinates, not merely as an aid in its consideration of the actual evidence but in lieu of the reporter's transcript, as a basis for overruling its Trial Examiner and making findings of fact upon which it revokes a license.

Respondent suggests that petitioner's belief as to the accuracy and prejudicial nature of the summary is based upon mere surmise (Resp. Br., pp. 18-19). But petitioner had alleged, and respondent failed to deny, that the Commission "refused to produce such summary or digest for use as a basis for an agreed summary of testimony to be included in a printed joint appendix" for the court below "except on condition that the petitioner agree to use it for no other purpose" (R. 132). Certainly if the staff summary were good enough for the Commission to consider in lieu of the evidence, it should have been good enough for the Court of Appeals to have used. And, even if it could be asserted that an administrative body could properly consider a summary of evidence instead of referring to the actual record to resolve disputes of fact, certainly this authority to substitute should be safeguarded by permitting all interested parties to see the summary which is used to replace the record. But respondent

stoutly refused to let petitioner examine this summary unless petitioner would agree that it would make no objection to the action taken by the Commission on the ground that the summary, through omission or inclusion, was unfair to petitioner. That is to say, before letting petitioner examine the summary, respondent would have required petitioner to waive any rights it might be found to have to complain of the Commission's action on the ground that the summary were prejudicial. If the summary were not prejudicial, how can one account for the eagerness of the Commission to extract, as a price for seeing it, that the petitioner waive what might prove to be substantial rights? The belief that the summary was prejudicial is strengthened by the fact that the Commission would neither admit nor deny that it was prejudicial, and also by the fact that the Commission reversed the Trial Examiner on the facts although the Trial Examiner had heard all of the evidence in person.

CONCLUSION

It is submitted that the several questions raised by the petition are of great importance and that this Court should settle the applicable principles in the interest of affording proper guidance to government agencies, assuring protection to the private parties who are regulated by them, and strengthening public confidence in the administrative process. Otherwise this case must stand as holding that, although evidence may be omitted, spurious exhibits included, and a secret summary substituted for the actual record before an administrative body, a person aggrieved by this unfair procedure is without any remedy.

Respectfully submitted,

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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 524

NORRIS & HIRSHBERG, INC., PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

No opinions accompanied the orders of the United States Court of Appeals for the District of Columbia dated November 19, 1947 (R. 198)[1] and January 5, 1948 (R. 199). A prior opinion in the same action dated February 17, 1947 (R. 146), as amended June 5, 1947 (R. 153), is reported at 163 F. 2d 689.[2] The opinions and

[1] Unless otherwise indicated references herein are to the pages of the printed record.

[2] Only the amended opinion is reported.

orders of the Securities and Exchange Commission dated January 22, 1946 (R. 44), April 17, 1946 (R. 111), and March 11, 1947 (R. 163), are contained in Securities Exchange Act Release Nos. 3776, 3810, and 3926 but have not as yet been reported.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. 347 (a)), to review orders of the United States Court of Appeals for the District of Columbia dated November 19, 1947 (R. 198), and January 5, 1948 (R. 199).

QUESTION PRESENTED

Was it error for the court below to require a petitioner seeking review of an order of the Securities and Exchange Commission to brief his case on the merits without directing interrogation as to the manner in which the members of the Commission utilized the record in arriving at their decision where, after two years of preliminary controversy and rulings concerning a proper certification, there remains no dispute that the certified transcript of the record properly reflects the evidence that was offered and received in the administrative proceedings?

STATUTE INVOLVED

Section 25 of the Securities Exchange Act of 1934, 48 Stat. 901 (15 U. S. C. 78y) provides:

SEC. 25. (a) Any person aggrieved by an order issued by the Commission in a proceeding under this title to which such person is a party may obtain a review of such order in the Circuit Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the Court of Appeals of the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, and enforce or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing be-

fore the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, and enforcing or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

STATEMENT

Petitioner is a broker and dealer in securities registered as such pursuant to the Securities Exchange Act of 1934 (15 U. S. C. 78). In opinions and orders dated January 22, 1946, and April 17, 1946, the Commission revoked petitioner's license pursuant to Section 15 (b) of the Securities Ex-

change Act, after finding that petitioner had willfully violated the anti-fraud provisions of that Act and of the Securities Act of 1933 (15 U. S. C. 77), by abusing its fiduciary relationship to its customers and by fraudulent and manipulative market practices, and that it was in the public interest to revoke. The Commission granted administrative stays of its order pending consideration of a petition for rehearing, and, after denial of rehearing in the order of April 17, 1946, pending the filing of a petition for review (R. 111–113).

On April 29, 1946, petitioner filed a petition for review in the court below (R. 153). The Commission stipulated to a stay of the revocation order pending review, and the court on May 2, 1946, directed such a stay. The stay has continued in effect to the present time and petitioner has continued in business as a broker and dealer.

On June 8, 1946, a transcript of record was filed on behalf of the Commission (R. 154). The form of certification was one which the Commission had theretofore used without challenge, executed by the chief of its Docket Section, who is the official custodian of its records (R. 206–7, 170–1).

Without first giving the Commission an opportunity to correct the transcript, petitioner on June 28, 1946, applied to the court below for a common law writ of certiorari directed to the Commission, citing as deficiencies in the certified

transcript that: (1) the copies of the stenographer's transcript did not reflect corrections accepted by the parties prior to the Commission's decision; (2) the index to the transcript as filed misdescribed certain of petitioner's exhibits which had been submitted and received in evidence, as received "for identification only"; (3) that extraneous material purporting to be summaries and explanations of certain Commission exhibits, which extraneous material was never offered or admitted in evidence, was included in the exhibits as if part thereof; (4) that the Commission had failed to file as part of the record a summary or digest of the testimony, which petitioner stated its attorney had been permitted to see but not examine, and which as a matter of "common knowledge" the Commission was alleged to have prepared for its use in the decision of cases, which summary petitioner "believes" inaccurate. Arguing from these objections that the Commission's decision was not based upon a proper consideration of the record, petitioner sought to have the Commission interrogated as to its use of the record. (R. 128–134.)

On July 17th, 1946, the Commission answered urging that corrections theretofore submitted to the Clerk[3] and now tendered to the Court fully

[3] The Commission tendered a corrected index and a corrected stenographer's transcript as soon as these matters were called to its attention (R. 140–145). A rule of the court below permits parties to stipulate to a corrected transcript

met petitioner's complaint with respect to the index and with respect to the variations in the stenographer's minutes;[4] that it was apparent from the face of the record that the so-called extraneous material had not been deemed evidence by the Commission; that, at least on the basis of the corrections tendered by the Commission there was no record support for petitioner's surmise that the Commission had been misled as to what constituted evidence in the case; and that it was improper to direct an inquisition as to the existence or content of any summary of evidence which might have been prepared as part of the Commission's decisional process.[5] (R. 135–139.)

(Rule 38 (e)), but the clerk of the court below refused to accept the corrected documents on the ground that litigation with respect to them was pending.

[4] Petitioner had not pointed out specifically wherein the carbon copy of the stenographer's minutes filed in the court differed from the ribbon copy which had been retained by the Commission. Pursuant to stipulation between petitioner and counsel who conducted the administrative hearing for the Commission, corrections had been agreed to, and initialed upon both ribbon and carbon copies. A page-by-page check made in response to petitioner's objections revealed variations on only three pages and these of a trivial character (R. 136–137).

[5] After having, on August 8, 1946, obtained a seven-week extension of time to reply to the Commission's answer, petitioner sought to be relieved of briefing the case on the merits until after disposition of the issues he had thus raised. The court below never ruled directly on this request but its subsequent action returning the record to the Commission and compelling the Commission to recertify had the effect under its rules of giving the petitioner until 40 days after the Commission's final certification to submit its brief. Petitioner's motions are part of the unprinted record.

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Petitioner's reply was filed on September 6, 1946, oral argument was heard on October 25, 1946, and the court below rendered an opinion on February 17, 1947 (R. 146–152). That opinion, ignoring corrections theretofore tendered by the Commission, criticized what had been originally filed because that transcript contained as Commission exhibits documents not received in evidence, and because of the mislabeling in the index. The court stated it was unable to say whether the index was prepared only for the court or for the Commission itself (R. 149). It was concluded that certification by the official custodian of the Commission's records could not satisfy the statutory requirement that "the Commission shall certify," and that the certification was likewise deficient for certifying the transcript as the record "of the proceeding * * * in which the orders complained of * * * were entered," rather than, as the statute prescribes, a "transcript of the record upon which the order complained of was entered."[6] (R. 150–151.) The court ruled, however, that it would be "neither necessary nor proper" to include in the transcript any summary of evidence which the Opinion Writing Office of the Commission may have sub-

[6] This objection, while not raised by the petition for a common law writ of certiorari, had at least in part been raised in subsequent argument by petitioner. (See Petitioner's Memorandum in Support of Petition for Certiorari, in the unprinted record.)

mitted to the Commissioners in the course of decision. Petitioner sought a rehearing as to this ruling of the court below. (R. 175.)

On March 11, 1947, and without waiting for the disposition of this petition for rehearing, the Commission tendered a new certification (R. 161–162) executed "By the Commission" through its Secretary and in the statutory language (R. 161–162). This certification incorporated documents already on file with the court below specifying the corrections theretofore tendered in lieu of a portion of the original certification and certifying that the disputed index was not part of the record upon which the order complained of was entered, and that the explanatory material attached to certain Commission exhibits "were not offered or received in evidence and were ruled by the Commission not to be evidence in the case" (R. 162). Attached to this certification was an opinion of the same date describing in more detail the record status of the material which had troubled the court below and the relevant administrative practice in connection with certification, including reasons for preserving and certifying, as a record of what had in fact transpired, the material which the Commission had ruled not to be evidence (R. 163–174).

On June 5, 1947, the court below denied rehearing but amended, as of its original date, the opinion of February 17, 1947 (R. 153–60). Without dis-

cussing the Commission's opinion of March 11, 1947, or directly ruling upon the transcript therewith tendered, it directed its clerk to remove the record from the files of the court below and return it physically to the Commission. The amended opinion ruled for the first time that the original certification was objectionable as including surplusage [7] and ordered "that the Commission must file a transcript containing, in addition to the pleadings, all the material received in evidence, and nothing else." (R. 160.) The Commission sought reconsideration of the court's order insofar as it required physical removal from the court's files of material theretofore filed, urging that this material might be needed for subsequent consideration by the court below in connection with review on the merits or consideration by this court in the event that either party would desire to file a petition for certiorari.[8] (R. 175–185.) This re-

[7] The Commission had relied both in arguments of its counsel, and in its March 11, 1947, opinion upon the fact that statements identical to those criticized as improperly attached to the exhibits in question were elsewhere properly in both the administrative record, and the court record, to show the contentions which the Trading and Exchange Division of the Commission had served upon petitioners and the examiner (R. 255).

[8] The Commission also made an attempt to meet the court's views as to convenience by referring specifically to portions of the transcript theretofore certified as the transcript of record upon which the order complained of was entered.

quest was refused on July 16, 1947, and the record was returned.* (R. 193.)

On July 21, 1947, petitioner moved the Commission to vacate its findings and opinion and order, and to hear oral argument upon the issues resulting from the remand (Petitioner's Motion for Judgment or Other Appropriate Relief, p. 5, Unprinted Record). The Commission denied this motion on September 23, 1947. On the same date it recertified the transcript to the Court of Appeals in the form now challenged by the petition for certiorari. (R. 194–197.) Petitioner again objected, claiming that the record was still deficient in its failure to contain the alleged summary of the record; and the certification was again attacked on the ground that the certification did not indicate how the various items objected to in the record as originally certified were treated by the Commission in its decisional process (R. 147). Petitioner asked that a master be appointed, interrogatories framed and issued, or detailed statements certified by the Commission pursuant to court order. All these requests were denied in the order of the court below entered November 19, 1947, one of the orders to which this petition for writ of certiorari is addressed. (R. 198.)

*The Commission has preserved the material which the court returned and thus has been in a position to certify in connection with the stipulation filed in this Court such portions of the material as the parties have desired to present to this Court in connection with the petition for a writ of certiorari.

Petitioner then moved for a rehearing, for findings of fact and conclusions of law to be entered by the court below, for recall of the record sent back to the Commission so that it might be lodged in this Court for purposes of review, and for the further suspension of proceedings on the merits (R. 198–199). On January 5, 1948, the court below denied all the requests, and petitioner was ordered to file its brief on the merits by January 12, 1948, unless, in the meantime, a petition for writ of certiorari was addressed to this Court (R. 199–200). This is the second order sought to be reviewed in this Court.

This petition for a writ of certiorari having been filed on January 12, 1948, the petitioner continues to enjoy not only a stay of the administrative order but a stay of any obligation to prosecute his petition to review by filing a brief on the merits.

ARGUMENT

1. The petition for a writ of certiorari raises only the question whether the court below erred in directing petitioner to prosecute its case on the merits after two years of interlocutory rulings as to a proper certification of the administrative transcript. Whatever may have been the justification, or lack of justification, for petitioner's exceptions to the earlier certifications filed by the Commission, it is not disputed that the present certified transcript fully reflects the evidence offered and received in the administrative proceed-

ing. That transcript is certified "By the Commission" and in the exact language of the statute. That the certification by the Commission is attested by its Seal and the signature of its Secretary rather than by signatures of the individual Commissioners merely conforms to the method by which all other Commission action is evidenced, both in the cases of the Securities and Exchange Commission and other administrative commissions. If the petitioner contends that a reviewing court lacks jurisdiction to proceed with a petition for review on the merits until it is satisfied, on the basis of a time-consuming inquiry into the intellectual processes of the individual deciding Commissioners, that they have made conscientious use of the record, then, while the issue is of course an important one, petitioner's contentions are clearly unwarranted. Such an inquisition has repeatedly and uniformly been denied.[10]

Petitioner does not squarely challenge these holdings, but has attempted to distinguish this case by pointing to alleged "deficiencies and in-

[10] *United States* v. *Morgan*, 313 U. S. 409; *Southern Garment Mfrs. Ass'n* v. *Fleming*, 122 F. 2d 622 (App. D. C., 1941); *Bethlehem Steel Co.* v. *N. L. R. B.*, 120 F. 2d 641 (App. D. C., 1941); *N. L. R. B.* v. *Lane Cotton Mills Co.*, 108 F. 2d 568 (C. C. A. 5, 1940); *N. L. R. B.* v. *Botany Worsted Mills, Inc.*, 106 F. 2d 263 (C. C. A. 3, 1939); *Inland Steel Co.* v. *N. L. R. B.*, 105 F. 2d 246 (C. C. A. 7, 1939); *Cupples Co. Mfrs.* v. *N. L. R. B.* 103 F 2d 953 (C. C. A. 8, 1939); *N. L. R. B.* v. *Biles Coleman Lumber Co.*, 98 F. 2d 16 (C. C. A. 9, 1938). *Cf. National Labor Relations Board* v. *Cherry Cotton Mills*, 98 F. 2d 444 (C. C. A. 5, 1938).

adequacies" in the record, which it argues warrant further inquiry into the Commission's use of the record in this case. If there were substance to this contention, it is not, we submit, a matter warranting review by this Court in advance of review on the merits. In any event petitioner's arguments rest upon nothing more substantial than its own highly suspicious surmise.

2. The Commission has clearly ruled not to be evidence the argumentative explanations which were attached to certain exhibits by the Trading and Exchange Division of the Commission after their introduction in evidence and before the case was submitted to the trial examiner. This ruling at the oral argument [11] was reiterated in the certification submitted after the court below had questioned the status of this material (R. 162). Petitioner has never contended that the material was not properly in the administrative record as argumentative material, since identical statements were contained in the proposed findings which the staff of the Trading and Exchange Division served on petitioner's counsel (R. 255). The objection was merely that, by physically attaching duplicates of this argumentative material to the exhibits which it summarized and explained, there

[11] At the argument the presiding Commissioner first ruled that "they will be removed" and then after further colloquy that "they will go in their proper place as part of the argument rather than as part of the record" (R. 259).

was given "the appearance that they form part of the exhibits actually in evidence" (R. 259).

In allowing the material to remain in its files together with the Commission's ruling, the Commission has merely followed a common practice whereby the granting of a motion to strike, at least in the case of material which is not scandalous, does not result in the stricken material being physically removed from a record. Accordingly, we believe that the material was properly included in the original certification which placed before the court below a record of precisely what happened in the course of the administrative hearing. However, the action of the court below, taken in connection with petitioner's objections, has resulted in the material being physically excluded from the record of the court below.[12]

Had the court below required petitioner to brief its case on the merits and deferred until con-

[12] In its final certification dated September 23, 1947, which the court below accepted, the Commission excluded this material under protest but stated that it was prepared to recertify this material if needed as a result of further proceedings in the court below or in this Court (R. 194–7). Pursuant to stipulation so much of this material as the parties have desired to use in connection with the present petition for a writ of certiorari has been certified by the Commission and attached to the stipulation filed in this Court (R. 201–206). The present petition for a writ of certiorari does not challenge the court's exclusion of this material and return of the same to the Commission by its order dated July 16, 1947. The time to review this interlocutory ruling has long since expired.

sideration on the merits this and other objections of petitioner, we believe the triviality of petitioner's objection would have been the more apparent, inasmuch as petitioner never related to any significant issue on the merits his objections to the attaching of the explanatory material to the exhibits. Indeed petitioner never indicated to the Commission wherein the explanatory material was inaccurate in its purported summary and explanation of the exhibits in question.[13]

3. The objection based upon the original, and now withdrawn, index is even more captious. The original index showed on its face that it had been prepared after the decision under review since it included as part of its indexed items the opinions and orders of the Commission. Moreover, the supposition on the basis of the index that the Commission treated exhibits received in evidence as merely received for identification was refuted by the fact that the Commission quoted from and expressly relied upon part of this material in its opinion (R. 83). In any event the physical body of the record leaves no doubt that this material was—as petitioner rightly contends—part of the evidence (R. 127–8).

The Commission's opinion of March 11, 1947, describes its administrative practice in connection with the preservation and certification of records,

[13] The petition for a common law writ of certiorari urges without specification of detail that the summaries are inaccurate (R. 131).

explains that in accordance with that practice the official custodian of its files had prepared the index as a routine clerical matter, for the convenience of the reviewing court and the parties to the review proceeding, and had done so after the petition for review had been filed (R. 163–174). There was thus no basis for the supposition that the error in the index may have misled the Commission in deciding the case. Here again we believe that by persuading the court below to entertain his procedural objections in advance of review of the case on the merits, the petitioner succeeded in creating a wholly false impression as to the significance of a clerical error occurring after the petition to review was filed. The consequence has been to delay progress with the merits of the case. In any event the various corrected indices tendered in the court below and the final certification accepted by the court below removed the incorrect index from the case.

4. Further justification for inquiry into the Commission's use of the record is sought by petitioner in the announced policy of the Commission to utilize staff assistance in the discharge of its statutory responsibilities.[14] Petitioner has alleged

[14] The Commission has made no mystery of its procedure for utilizing its Opinion Writing Office to aid it in the discharge of its statutory duties. Normally, this office prepares an unbiased digest of the evidence for the use of the Commis-

that the staff of the Opinion Writing Office prepared, in this case, a summary of the record for the use of the Commissioners in the course of their deliberations.

The Commission has neither affirmed nor denied the existence of such a summary and of course has not denied the charges based upon petitioner's surmise that the Commission used a misleading summary. The Commission has maintained that the internal memoranda utilized by it in the course of decision are not open to inquiry by petitioner any more than are the deliberations at the Commissioners' conferences. As this Court has held, such an inquiry may not be conducted, for it renders a statute which is designed as a proceeding to review an order a vehicle for general exploration by one arm of the government into the internal affairs of another in complete disregard of the "appropriate independence" of the administrative agencies and courts and the "integrity of the administrative process." *United States* v. *Morgan,* 313 U. S. 409. Petitioner has not referred us to any ground for distinguishing the holding in the *Morgan* case. Instead, it characterizes the summary as "prejudicial" although it is admitted that

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sioners. More detailed facts concerning this procedure were published, pursuant to the requirements of Section 3 (a) of the Administrative Procedure Act, in the Federal Register of September 11, 1946, 17 C. F. R. 177A–718.

counsel for petitioner have never examined it (R. 132).[15]

5. Petitioner's third argument appears to be that in the light of what had theretofore transpired in the case the Commission was precluded from certifying as a Commission in the language of the statute that the documents are those "upon which the order of the Commission complained of was entered." In that connection petitioner adverts (Pet. br. n. 5, p. 14) to changes in the personnel of the Commission,[16] and to the statement by the Commission to the court below, that the earlier certification then tendered "can purport to be no more than an assurance of the Commissioners now certifying that they conscientiously regard" the accompanying documents as "a transcript of the record upon which the order

[15] A statement by the trial examiner is quoted to indicate the "misleading nature of the summary" (Petitioner's brief, p. 13). This quotation itself is wholly misleading, for, as is apparent, the examiner was there commenting upon requests for findings offered to him by the Trading and Exchange Division. These requests were served on the petitioner in normal course and can have no connection with the alleged summary of the record prepared by the Opinion Writing Office. Section 5 (c) of the Administrative Procedure Act (5 U. S. C. 1004 (c)) requires that these divisions have separate and distinct functions and may not collaborate. The Commission adheres strictly to this requirement. See 17 C. F. R. 177A–718.

[16] Actually only one of the Commissioners who participated in the order under review was in office on September 23, 1947, which is the date of execution of the certification presently under attack.

complained of was entered." (R. 190.) This is characterized as an "evasion" and it is not clear that any certification by present Commissioners could satisfy petitioner.

We believe that the properly authenticated orders of the Commission which petitioners seek to set aside themselves constitute an affirmation by the Commissioners then in office that they conscientiously discharged their decisional process. Upon remand of the case by the order of the court below dated July 16, 1947, successor Commissioners were afforded an opportunity to reopen the case, or to recertify the record in the light of the court's action. When the Commissioners then in office did recertify the record in the language of the statute, we believe it clear on basis of the authorities already cited (note 10, p. 13, *supra*) that there was no basis for further inquiry as to the decisional process. Indeed the changes in membership which have occurred only emphasize the inappropriateness of the inquiry which petitioner seeks.

CONCLUSION

It is now almost two years since the petitioner has filed its petition for review in the court below. This petition for certiorari is the latest of petitioner's numerous applications and motions, none of which in our opinion involved any issue going to the substance of the case and which have

thus far prevented the case from being heard on the merits in the Court of Appeals. The contentions raised by the petition for certiorari are specious—and would not present any issues warranting further review by this Court even if they were not. The petition for certiorari should be denied.

Respectfully submitted.

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